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No. 03-573

IN THE

Supreme Court of the United States

ESSEF CORPORATION, PAC-FAB, INC., AND STRUCTURAL EUROPE N.V.,

Petitioners,

v.

JOHN AND JOYCE SILIVANCH, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Petitioners have demonstrated that the decision below is in conflict with decisions of this Court and of other courts of appeals on an important element of federal judicial procedure: namely, whether an attorney's good-faith mistake of fact precludes a finding of excusable neglect under *Pioneer Investment Services Co.* v. *Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), even in the absence of any prejudice to other parties, delay, or any impact on judicial proceedings. Pet. 9-17. In their opposition, respondents draw irrelevant legal distinctions and make unfounded claims that this case is not the proper vehicle for resolving those conflicts of authority. Their arguments lack force.

A. Respondents' suggestion (Silivanch Opp. 9) that the Second Circuit "faithfully applied" the equitable analysis this Court set forth in *Pioneer* is demonstrably wrong. In *Pioneer*, this Court directed trial courts making an "excusable neglect" determination to engage in an equitable balancing of "'all relevant circumstances,'" including four specific factors: "'[1] the danger of prejudice to the [non-movant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith.'" Pet. App. 17a (alterations in original) (quoting *Pioneer*, 507 U.S. at 395).

As an initial matter, respondents' claim that the Second Circuit "engaged in the very equitable balancing" that *Pioneer* commands, Silivanch Opp. 12; Hague Opp. 20, mistakes the role of a reviewing court. The balancing of relevant circumstances, including the *Pioneer* factors, is committed by Rule 4(a)(5) to the *district court*. The Second Circuit did not engage in balancing; rather, it held, under an abuse-of-discretion standard, that the district court was not entitled to give any weight to any factor other than the reason for delay (*i.e.*, to balance the factors). Pet. App. 19a-21a.

It is thus of no moment that the Second Circuit correctly recited the *Pioneer* factors, and "conclud[ed] that three of the *Pioneer* factors favored Petitioners and *not* these Respondents." Hague Opp. 21; Silivanch Opp. 11. The critical point is that the Second Circuit eliminated the discretion of the trial court to engage in an equitable balancing of the three factors favorable to petitioners (lack of prejudice, lack of impact on judicial proceedings from minuscule delay, and good faith) against the sole factor (reason for delay) that was unfavorable. That is squarely in conflict with *Pioneer*.

The Second Circuit thus mentioned the other *Pioneer* factors only to remove them from consideration, taking instead the "hard line" that a mistake of fact about the length of the appeal period is inexcusable. Pet. App. 21a. It did so precisely because it professed, for reasons of policy, a dislike of the kind of equitable balancing (and subsequent appellate review) that *Pioneer* commands: "the legal system would groan under the weight of a regimen of uncertainty in which time limitations were not rigorously enforced – where every missed deadline was the occasion for the embarkation *on extensive trial and appellate litigation to determine the equities of enforcing the bar*." *Id.* at 20a-21a (emphasis added). There could be no clearer statement of the conflict of the rule below with *Pioneer*.

Not only did the Second Circuit foreclose the equitable balancing *Pioneer* requires, but also it applied a rule that *Pioneer* expressly rejected when raised by the dissenting justices in that case: namely, that a movant must offer a "'sufficiently blameless'" reason for the delay in order for other factors to be weighed in the balance. See *Pioneer*, 507 U.S. at 395 nn.13-14; Pet. 10. Respondents have no answer to this point. Instead, respondents by *ipse dixit* convert the position of the *Pioneer* dissent into the holding of this Court, wrongly claiming in defense of the decision below that "*Pioneer* requires more than an excuse, it requires a *satisfactory* excuse." Hague Opp. 25.

Even though the decision below is flatly inconsistent with *Pioneer*, respondents nonetheless attempt to defend it as merely applying the principle recognized in *Pioneer* that neglect is "usually" not excused when it involves "inadvertence" to the rules, "ignorance of the rules, or mistakes construing the rules." 507 U.S. at 392. But there is no dispute that petitioners' trial counsel was keenly aware that Federal Rule of Appellate Procedure 4(a)(5) applied, had properly construed the Rule to require a notice of appeal to be filed no later than 30 days after entry of final judgment, and had attempted to comply with it. He simply made the mistake of relying on opposing counsel's calculation of the date, which proved to be erroneous. There was no inadvertence to, ignorance of, or mistake about the law – only a mistake of fact as to the deadline.

The Second Circuit has now extended this narrow observation disfavoring ignorance of the law into a broad exception that "failure to follow the clear dictates of a court rule will generally not constitute such excusable neglect." Pet. 21a (internal quotation marks omitted). But that exception swallows the excusable neglect rule of Rule 4(a)(5) and renders it a nullity. The 30-day appeal period from entry of judgment set forth in Rule 4(a)(5) is clear and unambiguous; thus *any* noncompliance (*i.e.*, any failure to file a notice of appeal within 30 days) is a failure to follow the clear dictates of the rule, and is now subject to the Second Circuit's unforgiving test in which equitable balancing of the reason for the delay against other factors is not allowed. The Second Circuit will forgive missed deadlines only in undefined "'exceptional circumstances'" if the error was within the movant's control. Pet. 23a; see *In re Town of Killington*, No. 2002-365, 2003 WL 22416506, ¶ 17 (Vt. Oct. 24, 2003) (characterizing *Silivanch* as a decision taking a "hard line when it comes to determining when neglect that stems from factors totally within the control of a party or its attorney is 'excusable'"). But this Court has emphatically held that the "'elastic concept'" of excusable neglect is not so

limited, *Pioneer*, 507 U.S. at 392, and "plainly contemplate[s] that the courts would be permitted, where appropriate, to accept late filings caused *by inadvertence, mistake, or carelessness*, as well as by intervening circumstances beyond the party's control," *id.* at 388 (emphasis added).[1] Here, counsel's failure to verify the appeal deadline was "neglect" as defined by this Court; the question of whether it is "excusable" necessarily entails the balancing of the reason for the neglect against the other factors that the Second Circuit has improperly removed from consideration. Indeed, respondents cannot come up with any circumstance that would not be subject to the Second Circuit's "hard line," or identify in what circumstances a missed appeal deadline would be subject to equitable balancing under the excusable neglect test. See Silivanch Opp. 14 n.7.

The short answer is that the Second Circuit's hard line against excusing any "failure to follow the clear dictates of" Rule 4(a)(5) is irreconcilable with *Pioneer* and the plain language of "excusable neglect." The Federal Rules could have made the 30-day appeal period a jurisdictional bright line, much like the 90-day rule for filing petitions for certiorari, Sup. Ct. R. 13.2. The policy reasons the Second Circuit sets forth (Pet. App. 20a-21a) could have been marshaled in support of such a rule. But the Federal Rules, perhaps in recognition of the harsh consequences of forfeiture of appeal rights and of the difference between direct appeals of right and discretionary review by a second appellate court, have adopted the "excusable neglect" standard when appeal deadlines are missed. The rule promotes the policy in favor of adjudicating appeals on the merits precisely because in most cases an error in meeting the deadline will not prejudice other parties or judicial proceedings. Furthermore, the Rule is structured to ensure that the relief is itself not prejudicial by requiring a motion within 30 days of the deadline, and by

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[1] Circumstances out of one's control (such as a vehicle breakdown enroute to court) do not generally involve neglect, and would be addressed under Rule 4(a)(5)'s "good cause" prong. Pet. App. 36a-37a.

limiting the extension to the later of 30 days from the deadline, or 10 days from the district court's order. Pet. App. 36a-37a. The policy choice embodied in Rule 4(a)(5) must be vindicated. The "excusable neglect" test of Rule 4(a)(5), by its plain terms, requires the district court to balance the equities by considering all circumstances. *Pioneer*, 507 U.S. at 388, 395. The Second Circuit has impermissibly forbidden it to do so.[2]

B. The petition demonstrates that the decision below not only is contrary to *Pioneer*, but it also has generated multiple conflicts with other courts of appeals as to (1) whether a court may elevate a single of the four *Pioneer* factors into a dispositive requirement; (2) whether, among courts of appeals that weight the *Pioneer* factors, the third *Pioneer* factor – the reason for the delay – or the first and second *Pioneer* factors – prejudice to other parties and the efficient administration of justice – are given primary importance; and (3) the type of conduct that is "excusable." See Pet. 11-17.

Unable to distinguish those conflicts, respondents the Silivanches (but not their co-respondents) attempt to evade them by implausibly asserting "*complete unanimity*" among the circuits. Silivanch Opp. 8. But all the cases that they cite as in harmony are classic mistake-of-law cases, where the movant had failed to heed or properly interpret the law. See *id.* at 16 n.8. Indeed, one of the cases expressly distinguishes between the rule it applies in mistake-of-law cases from that applicable to mistakes of fact. *Advanced Estimating Sys., Inc.* v. *Riney*, 130 F.3d 996, 999 (11th Cir. 1997) ("The ancient legal maxim continues to apply: ignorance of fact may excuse; ignorance of law does not excuse"). The Second Circuit has abrogated the distinction between mistake of fact and mistake of law, Pet. App. 22a-23a, but other circuits have

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[2] Contrary to respondents' contentions, Silivanch Opp. 7, 12, the decision below is not limited to the facts of this particular case. The Second Circuit created a general rule that the reason for delay (mistake of fact) has dispositive status under *Pioneer*; it applied that general rule here, but in no way limited future applications of that rule.

not. The tests they apply for noncompliance with a known rule are in stark conflict with the test the Second Circuit has applied here.

Respondents do nothing to refute petitioners' assertion of a division of authority where, as here, there has been no mistake of law but instead a simple mistake of fact. On this point, the circuits are decidedly split over whether such conduct is excusable. For example, in *Cheney* v. *Anchor Glass Container Corp.*, the Eleventh Circuit found excusable neglect where, though aware of the applicable rule governing filings, counsel failed to comply with that rule due to a miscommunication among lawyers. See 71 F.3d 848 (11th Cir. 1996). The Eleventh Circuit engaged in an equitable analysis of the four *Pioneer* factors and concluded that the excusable neglect standard was met. *Id.* at 850.

Petitioners' omission in this case is no different than the mistake-of-fact situation the Eleventh Circuit confronted in *Cheney*. Respondents unsuccessfully attempt to recast petitioners' neglect – like the omission at issue in *Cheney*, a mistake of fact – as a mistake of law. Hague Opp. 22-23; Silivanch Opp. 14 n.7. But such a characterization is belied by the record, which demonstrates that petitioners' counsel was not only cognizant of, but also intended to comply with, the governing rule. Respondents make no attempt to square the Eleventh Circuit's holding in *Cheney* – that a mistake of fact is excusable – with the *per se* rule created in the decision below that such a mistake is not excusable.[3]

Unlike the Silivanches, the other respondents acknowledge divergence among the circuits, but attempt to explain it away as an inevitable consequence of a balancing test, wherein "the various circuit courts in considering the four *Pioneer* factors have necessarily given different weight to these factors depending on the individual circumstances of the particular

[3] *See also In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315, 327 (3d Cir. 2001) (finding excusable neglect where movant failed to note newspaper advertisement that his right to a remedy was being litigated in a binding class action).

case under review." Hague Opp. 11. This argument does not withstand scrutiny. First, those respondents ignore that it is the district courts, not the courts of appeals, that engage in equitable balancing of the *Pioneer* factors. One would expect that the district court, in performing such balancing, may give different weight to different factors on the facts of the case. One would not expect, and this Court should not tolerate, divergence in the general rules that the courts of appeals announce to *constrain* the district court's discretion to find excusable neglect. Second, the conflicts identified concern those general rules announced by the court of appeals (which are not fact-specific), not the decisional outcomes that respondents devote much of their opposition to analyzing (which are fact-specific), see *id.* at 14-18. The conflicts are stark and warrant review by this Court.

C. Respondents the Silivanches make various arguments to suggest that this case does not present a good vehicle to resolve the conflicts described above. These arguments are so insubstantial and unfounded that neither the district court nor the Second Circuit paid them any mind, and tellingly their fellow respondents do not join those arguments.

1. The Silivanch opposition devotes much space to a discussion of cases establishing that if notice of a Rule 4(a)(5) motion is not given to other parties, the district court lacks jurisdiction to entertain such a motion. Silivanch Opp. 22-23 & n.12. As an initial matter, the Silivanches lack standing to raise this defense because it is undisputed that they were properly served. Their allegation is that *other* parties were not properly served. *Id.* at 22. Respondents cite no authority for the proposition – and there is none – that if other parties are not properly served, jurisdiction is defeated as to parties, like the Silivanches, who were timely served. Thus, the issue of proper service is irrelevant at least to the appeal of the judgment in favor of the Silivanches (who were awarded the lion's share of damages in this case), and thus no bar to this Court's review of the question presented. But, in any event, all parties received the requisite notice – which is evidently

why the other respondents who allegedly were not correctly notified never raise this argument.

First, service was proper as to all parties because it was made upon the Silivanches' counsel, who by order of the district court was liaison counsel responsible for giving notice to other parties. Pet. App. 30a-31a. The excusable neglect motion was made in the Silivanch docket, which was the bellwether docket (and in which the Silivanches were the only plaintiffs of record). Because of the prior district court order and the nature of the proceedings, service upon liaison counsel constituted service upon all the parties within the meaning of Rule 4(a)(5). Indeed, petitioners had served liaison counsel alone for years during the pendency of these proceedings without complaint from any party. There is nothing unusual in this practice; serving only liaison counsel is common in complex litigation where there are numerous parties and counsel. Second, even if service on liaison counsel were insufficient, any arguable defect in service to plaintiffs other than the Silivanches was cured because *all* parties had actual notice of petitioners' Rule 4(a)(5) motion, as the district court ruled. See Pet. App. 31a. The Silivanches now claim for the first time that the actual notice *other* parties received was too late, but that argument was not raised or litigated below.

Thus, it is beyond dispute that the district court had jurisdiction to extend the period for appealing the Silivanch judgment because the Silivanches' counsel was formally served. That alone eliminates any question of the suitability of this case for review by this Court. In any event, the Silivanches' arguments about the propriety of service on other parties is unavailing because service upon liaison counsel sufficed as to all other parties, and because those parties received actual notice of the motion. The red herring the Silivanches raise over the service of petitioners' Rule 4(a)(5) motion did not give the Second Circuit pause, and it likewise does nothing to diminish the worthiness of this case for review by this Court.

2. The Silivanches next assert that this case is a bad vehicle for review for a second reason (again without support of the other respondents). They allege that certain alternative arguments made in the district court hearing were not made in good faith, and thus one of the *Pioneer* factors – whether the party seeking an extension acted in good faith[4] – weighs against petitioners in this case. Silivanch Opp. 24-26.

This argument is both unfounded and irrelevant. First, the Silivanches neglect to disclose that the district court summarily dismissed their motion for sanctions, which was based on this very same bad-faith argument. See Pet. App. 31a-32a; Plaintiff's Memorandum of Law In Opposition To Essef's Motion Pursuant to Fed. R. App. R. 4(a)(5) and (6), at 17-18 (S.D.N.Y. filed Apr. 12, 2002). There was no finding that petitioners made any argument in bad faith, and respondents' overheated allegations were amply rebutted in the district court and ignored by the Second Circuit.

Second, these allegations are irrelevant to the good faith element of the *Pioneer* test. The sole inquiry for purposes of the *Pioneer* test is the existence of good faith in complying with the 30-day requirement for filing notices of appeal in Rule 4(a), not whether there was good faith in a subsequent

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[4] The Silivanches are correct that "good faith" is one of the four *Pioneer* factors and was mistakenly omitted in the petition's summary of those factors. But respondents' assertion that petitioners "conveniently, and misleadingly, omit any discussion of this important equitable factor," Silivanch Opp. 24 & n.13, is baseless. The central theme of the petition is that good-faith mistakes of fact should be subject to equitable balancing, and that the Second Circuit erred in excluding consideration of good faith. *See, e.g.*, Pet. 3 (noting that this Court in *Pioneer* held that "good faith and the absence of prejudice or of effect on judicial proceedings 'weigh strongly' in favor of finding excusable neglect" (citing *Pioneer*, 507 U.S. at 398)); *id.* at 6 (discussing the Second Circuit's recitation of the *Pioneer* factors as including, *inter alia*, "whether the movant acted in good faith" (internal quotation marks omitted)); *id.* at 8, 9, 15-16 (noting that the Second Circuit's treatment of good-faith mistakes was in conflict with other courts); *id.* at 10 (criticizing the decision below for not taking into account *Pioneer*'s good-faith inquiry).

excusable-neglect proceeding seeking an extension of time. See *Pioneer*, 507 U.S. at 395 (discussing good faith as a factor in what "sorts of neglect will be considered 'excusable'"). On the relevant point, even the Silivanches do not contest that petitioners' counsel made an honest mistake by erroneously relying upon opposing counsel's calculation of a deadline. Neither the district court nor the Second Circuit questioned the good faith of petitioners' counsel in complying with Rule 4(a)(5). The court of appeals instead acknowledged that the absence of good faith is "rarely" an "issue" in excusable neglect cases. See Pet. App. 17a (citing *Lowry* v. *McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir), *cert. denied*, 531 U.S. 929 (2000)). Indeed, the other respondents concede that the Second Circuit found good faith to be a factor favoring petitioners in this case. Hague Opp. 20-21. In sum, the Silivanches' arguments on good faith are both unsupported and beside the point, and cast no doubt on the suitability of this case for review.[5]

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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[5] The Silivanches assert that in order to reach the merits of the question presented in the Petition, this Court would have to decide first whether *Pioneer* applies to Rule 4 cases. *See* Silivanch Opp. 6 n.2. But they do not assert that there is any controversy on this point, nor do they even argue that it does not apply. First, *Pioneer* itself clearly established that the term "excusable neglect" – the same term employed by Rule 4 – is a term of plain meaning, *see Pioneer*, 507 U.S. at 388, and so excusable neglect has the same meaning in Rule 4 as it does elsewhere. Perhaps that is why every circuit to have addressed the issue has squarely held or accepted without question that *Pioneer*'s excusable neglect test applies to Rule 4, a fact of which this Court took notice of in *Stutson* v. *United States*, 516 U.S. 193, 194-95 (1996) (per curiam). Second, if there were any substantial doubt on the applicability of *Pioneer* to Rule 4, this Court would not have granted, vacated, and remanded in *Stutson* after the Solicitor General confessed error when a court of appeals failed to apply *Pioneer* in a Rule 4 case. The other respondents correctly concede that the issue is no longer in doubt after *Stutson*. *See* Hague Opp. 10 n.2.

Respectfully submitted,

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